UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MCDONALD'S USA, LLC, A JOINT EMPLOYER, et al.	**Cases**	**02-CA-093893, et al.** **04-CA-125567, et al.** **13-CA-106490, et al.**
and		**20-CA-132103, et al.** **25-CA-114819, et al.**
FAST FOOD WORKERS COMMITTEE AND SERVICE EMPLOYEES INTERNATIONAL UNION, CTW, CLC, et al.		**31-CA-127447, et al.**

CHARGING PARTIES' OPPOSITION TO RESPONDENT McDONALD'S USA, LLC's AND THE GENERAL COUNSEL'S REQUESTS FOR SPECIAL PERMISSION TO APPEAL THE ADMINISTRATIVE LAW JUDGE'S JULY 17 ORDER DENYING MOTIONS TO APPROVE THE SETTLEMENT AGREEMENTS[1]

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[1] On August 14, 2018, Charging Parties filed a Motion for Recusal of Chairman Ring and Member Emmanuel. For the reasons set forth therein, Chairman Ring and Member Emmanuel should take no part in this case, including the pending special requests for permission to appeal.

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All Charging Parties in the above consolidated cases—the Service Employees International Union ("SEIU"), the Fast Food Workers Committee ("FFWC"), and other regional workers' groups now affiliated with SEIU under the auspices of the National Fast Food Workers Union ("NFFWU") (collectively, "Charging Parties")—firmly oppose Respondent McDonald's USA, LLC's ("McDonald's") and the General Counsel's Special Requests for Permission to Appeal Administrative Law Judge Esposito's ("ALJ") July 17, 2018 Order Denying Motions to Approve Settlement Agreements ("Order").[2]

Contrary to McDonald's and the General Counsel's assertions, the ALJ did not abuse her discretion in rejecting the proposed settlements, nor did she commit the parties to additional protracted litigation. Rather, the ALJ rejected inadequate settlements based on a well-reasoned application of *Independent Stave Co.*, 287 NLRB 740 (1987). Her fair and thorough evaluation of the proposed settlement package appropriately took account of the background and context of this litigation, as well as the course of the proceedings to date. As demonstrated at length in her Order and discussed below, the ALJ correctly found that the proposed settlement agreements fell short of fulfilling statutory goals, failed to vindicate the public interest, and did not warrant approval. The Board should deny the special appeal requests, and the ALJ's Order should stand.

[2] Instead of prefacing the Argument in this brief with lengthy statements of facts and proceedings detailing the history of this case, and rather than reiterate all the arguments presented to the ALJ, Charging Parties incorporate by reference (and attach hereto as Exhibits A and B, respectively) their April 27, 2018 and May 4, 2018 briefs to the ALJ challenging the proposed settlements, and refer to the ALJ's detailed Order accurately describing this case and the proceedings that took place before her. In addition, to avoid unduly burdening the record this brief also cites record material already included in the 2500+ pages submitted by McDonald's and General Counsel in connection with this special request for permission to appeal. A copy of the ALJ's July 17 Order can be found at Exhibit 1 to McDonald's appeal submission or at Exhibit A to the General Counsel's submission.

ARGUMENT

THE ALJ PROPERLY EVALUATED AND REJECTED THE GENERAL COUNSEL'S PROPOSED SETTLEMENT PACKAGE UNDER THE BOARD'S CONTROLLING PRECEDENT

I. THE ALJ APPLIED THE CORRECT LEGAL STANDARD

As the ALJ recognized, the discretionary determination whether to accept the proposed "global" settlement agreement is controlled by *UPMC*, 365 NLRB No. 153 (Dec. 11, 2017), the current Board's lead decision reaffirming and applying *Independent Stave Co.*, 287 NLRB 740 (1987). *See* Order at 17.[3] Both these decisions acknowledge the Board's longstanding policy of encouraging resolution of disputes without litigation "in order to promote productive and stable collective bargaining relationships and labor relations." *Id.* (citing *UPMC*, 365 NLRB No. 153, slip op. at 3, and *Independent Stave*, 287 NLRB at 741).

Nonetheless, that pro-settlement policy is "not without its limitations," for the Board's overriding responsibility is to enforce the NLRA "in the public interest." Order at 17 (citing

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[3] In *UPMC* the Board explicitly restored the *Independent Stave* criteria for evaluating a proposed settlement and placed primary emphasis on the "reasonableness" factor. *See UPMC*, 365 NLRB No. 153, slip op. at 1, 8 (declaring "[t]oday, we return to the Board's prior practice of analyzing all settlement agreements, including consent settlement agreements, under the "reasonableness" standard set forth in *Independent Stave*;" emphasizing that "the 'reasonableness' factor," *i.e.*, "factor 2," is "the most important consideration"). The General Counsel rightly recognizes that *UPMC* governs this case. *See, e.g.*, GC Brief at 13 (accepting *UPMC* as precedent and arguing that this case satisfies the *UPMC* "reasonableness" criterion based on its specific circumstances). Indeed, the General Counsel specifically invoked and relied on *UPMC* when presenting the proposed settlement package to the ALJ at the April 5, 2018 hearing. *See* Tr. 21237-38 (citing *UPMC*), 21240 (emphasizing *UPMC*'s teaching that *Independent Stave*'s "reasonableness" evaluation ("Factor 2") is the "most important" consideration). While McDonald's now appears to hedge—at some points acknowledging *UPMC*'s precedential status while at other points disavowing its import, *see, e.g.*, McDonald's Brief at 3-4—McDonald's original motion for approval of the settlement expressly invoked *UPMC* as the governing standard. *See* March 19, 2018 Motion to Approve at 11 ("In evaluating the settlement, the Court should 'examine[] all the surrounding circumstances to determine whether the settlement is "reasonable"') (citing and quoting from *UPMC*, 365 NLRB No. 153, slip op. at 7).

Independent Stave, 287 NLRB at 741). Thus, the discretion to abandon a proceeding, once instituted, is not delegated to the General Counsel and Respondents, but, rather, remains vested in the Board and its ALJs. *Id.* And those decision-makers rightly "'refuse to be bound by any settlement that is at odds with the Act' or with [the Board's] own policies." Order at 17 (quoting *Independent Stave*, 287 NLRB at 741; citing *UPMC*, 365 NLRB No. 153, slip op. at 3 (internal citation omitted)).

Moreover, as a threshold matter, "it is axiomatic that a settlement requires a meeting of the minds, or a genuine agreement between the parties." Order at 2. As the Board has instructed, disapproval of a proposed settlement is *mandatory*, not discretionary, in the absence of a genuine agreement: "Where . . . the parties' different understandings of the language of a settlement agreement warrant the conclusion that there was no meeting of the minds, *the agreement must be set aside*." *Doubletree Guest Suites Santa Monica*, 347 NLRB 782, 784 (2006) (emphasis added) (citing authority).

Accordingly, when evaluating whether to approve a post-Complaint settlement in lieu of further proceedings the ALJ and the Board must consider whether a genuine, binding agreement exists, and whether "under the circumstances of the case," accepting "any waiver or settlement of charges" will in fact "effectuate the purposes and policies of the Act." Order at 2, 17 (quoting *Independent Stave*, 287 NLRB at 741). As the ALJ recognized, the *UPMC/Independent Stave* analysis addresses these fundamental criteria by examining

> *all the surrounding circumstances including, but not limited to,* (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) *whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation*; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching settlement; and (4) whether

> the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

Order at 17 (citing *Independent Stave*, 287 NLRB at 743 (emphasis added)). *See UPMC*, 365 NLRB No. 153, slip op. at 7.

As demonstrated below, the ALJ properly concluded that the proposed settlements failed threshold scrutiny because there was no mutually binding, genuine agreement between the two proponents—that is, no meeting of the minds between the General Counsel and McDonald's regarding the fundamental terms of their purported agreement.[4] In addition, even assuming a mutually understood and fully binding agreement on the substance and operation of the settlement provisions, the ALJ properly denied approval because those settlements manifestly fail "the most important consideration," the "reasonableness" test ("factor 2") as affirmed and exemplified in *UPMC*, 365 NLRB No. 153, slip op. at 8-9.

II. THE ALJ PROPERLY CONCLUDED THAT THERE WAS NO MEETING OF THE MINDS REGARDING WHAT THE SETTLEMENTS REQUIRED OF MCDONALD'S

As noted above, a settlement must be rejected where there was no meeting of the minds between the settling parties—thus, no "genuine agreement"—because the parties did not share a common understanding of settlement terms and/or their respective obligations thereunder. Order at 2, 29. *See Doubletree Guest Suites*, 347 NLRB at 784. Here, the ALJ justifiably found that there was no meeting of the minds between McDonald's and the General Counsel with respect to McDonald's obligations under the settlement agreements—in particular, the default provisions

[4] Consideration of whether a binding settlement exists and, if so, who has agreed to be bound, is also encompassed within *UPMC/Independent Stave*'s "factor 1." Although a settlement typically entails at least a bilateral agreement between the respondent and a charging party or the General Counsel, a respondent's formal, on-the-record stipulation to entry of a consent Order against it may also satisfy the threshold requirement, as illustrated in *UPMC*. *See infra* at 15, 17-18, 19.

and the workings of the "Settlement Fund," purportedly significant components identified by the General Counsel as the "specifically intended" remedy in lieu of a joint-employer liability finding as to McDonald's. Order at 19, 22 (citing Tr. 21254). Noting the pronounced "confusion" and lack of a "coherent understanding" demonstrated in the settlement review proceedings, the ALJ accurately observed that "General Counsel and McDonald's have made so many conflicting statements that there is significant doubt as to whether they have actually reached agreement." *See id.* at 2, 19, 28-29.

The General Counsel and McDonald's spill considerable ink in their special appeal briefs attempting to demonstrate that there is no daylight between them. Yet despite those efforts, they now contradict each other further on an entirely new and critical point. Specifically, the settlement parties manifestly disagree as to what is required by the contingent "Special Notice" provision, the only concrete undertaking the settlements impose on McDonald's. *See* GC Brief at 11; McDonald's Brief at 16. After two rounds of oral questioning by the ALJ during the hearings, two rounds of exhaustive briefing on the motions for approval of the settlements (including detailed written objections by the Charging Parties addressing this very point), and the ALJ's comprehensive decision and Order, the General Counsel now offers an untenable new description of McDonald's Special Notice obligations—a unilateral modification that does not appear in any of the settlement documents and that stands in direct conflict with the explanation provided in McDonald's own briefing on this matter. This alone compels rejection of the pending appeal requests, as the Board confirmed in *Local Union 290 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry*, 348 NLRB 998, 998 (2006), and as detailed in Section II-A below.

A. The General Counsel's Unilateral, Undocumented and Untenable New Explanation of the "Special Notice" Undertaking Confirms the Propriety of the ALJ's Order and Warrants Denial of the Special Appeal Requests

The only remedy for most of the 180 ULP allegations in this case is the NLRB's standard long-form Notice to employees. But the proposed settlement agreements on their face fail to ensure that the prescribed remedial notice is actually issued by the respondent franchisee or actually received by all the affected employees (past and current). *See* GC Ex. Settlement 1-30; McDonald's Ex. 20-49. If a franchisee fails to comply with its first-stage notice-posting and mailing obligations, McDonald's does not issue the same long-form, detailed "WE WILL NOT" notice ("Full-Notice") on official NLRB forms that should have been posted and published. *Id.* Instead, McDonald's issues only a truncated "Special Notice to Employees" ("Special Notice") that fails to give employees the prescribed specific remedial assurances contained in the Full-Notice. *Id.* As the ALJ found, "if a Franchisee Respondent breaches a Settlement Agreement by failing to post the required Notice and fails to cure that breach, *no* Notice fully detailing the Franchisee Respondent's alleged violations, and consonant reassurances, will be provided to employees." Order at 31 (emphasis in original). Compounding that obvious, substantial deficiency, the short-form Special Notice exacerbates all the remedial omissions by *including* legal disclaimers and improper non-admissions language. *Id.*

Moreover, even the inadequate short-form notice that McDonald's does issue in the event of a franchisee default will not be posted in the workplace, nor will it be distributed to all those who would have seen or received it absent the default. Instead, McDonald's distributes the Special Notice only by mail, and this paper form is sent only to current employees (not to those former employees who were employed at the time and affected by the violations). In short, the proposed settlement agreements do not require performance by McDonald's of the Respondent Franchisee's own remedial obligation in the event the franchisee fails to perform.

In contradiction of the plain language in the "Performance" section of the settlement agreements and their attached Special Notices, the General Counsel now asserts, for the first time, his unilateral and unsubstantiated understanding that McDonald's, when mailing its Special Notice, is also obligated to *enclose* the Full-Notice the franchisee failed to post. *See* GC Brief at 11. The General Counsel cites no documentation or testimony supporting this entirely new reading of the settlement agreements; instead, he simply misquotes the first sentence of the Special Notice:

> A Regional Director of the National Labor Relations Board has investigated an unfair labor practice charge alleging that [insert franchisee name] violated the National Labor Relations Act by *failing to post the enclosed Notice*.

GC Brief at 11 (emphasis added). In fact, that Special Notice sentence actually states as follows:

> A Regional Director of the National Labor Relations Board has investigated an unfair labor practice charge alleging that [insert franchisee name] violated the National Labor Relations Act by [insert action at issue].

See GC Ex. Settlement 1-30; McDonald's Ex. 20-49. Thus, the General Counsel's belated new argument not only misstates the text of the agreements and the accompanying Special Notice, but also makes the pertinent statement in the McDonald's Special Notice nonsensical and facially erroneous: a Franchisee Respondent's failure to comply with its remedial notice obligation under the settlement is clearly NOT "*an unfair labor practice charge alleging that [insert franchisee name] violated the National Labor Relations Act by failing to post the enclosed Notice.*"[5]

As the record confirms, at no point do the settlement agreements or Special Notices use the word "enclose" or "enclosed" in connection with a franchisee's Full-Notice posting

[5] Leaving aside the question of what NLRA provision is violated by failure to post an agreed remedial notice, we note that the settlement agreements by their terms do not require the filing of "an unfair labor practice charge" in order to address a franchisee respondent's failure to perform its remedial notice undertaking.

obligation. *See* GC Ex. Settlement 1-30; McDonald's Ex. 20-49. Furthermore, prior to this special request for permission to appeal, neither General Counsel nor McDonald's ever employed "enclose" or "enclosed" with reference to the Special Notices. Notably, the "Performance" section in each of the 30 settlement agreements clearly states that upon a Regional Director's determination that a franchisee has not complied with its obligations under the settlement agreement, the Regional Director:

> Will promptly provide McDonald's USA LLC the approved Special Notices, in the form set forth below, and then provide 14 days to McDonald's USA, LLC to mail the approved Special Notices directly to the last known address of current employees employed by [franchisee name]. [Franchisee name] agrees to provide McDonald's USA, LLC such employees' names and last known addresses as a condition of the Agreement.

See GC Ex. Settlement 1-30; McDonald's Ex. 20-49. Conspicuously, the settlement agreements do not require the Regional Director (or a defaulting franchisee) to provide McDonald's with the Full-Notice for supposed enclosure with its Special Notice. Moreover, under the settlement agreements' express terms, the Full-Notices required of franchisees are "to be printed and posted on official Board notice form[s]." *See id.* Thus, if McDonald's is required to enclose a given franchisee's Full-Notice with its Special Notice as the General Counsel now suggests, it is not clear where McDonald's obtains that particular Full-Notice.

For its part, McDonald's asserts that it "will mail Special Notices to the last known addresses of Charged Franchisee Employees," with no mention of enclosures. McDonald's Brief at 16 (quoting GC Ex. Settlement 1 (paragraph entitled "Performance" and Special Notice). In further explanation of its notice obligations, McDonald's states that the Special Notices "contain language agreed upon by McDonald's USA and the General Counsel, and [the Special Notices] would inform recipients of the General Counsel's determination that the Charged Franchisee was in breach and of their general rights under the Act," again with no mention of enclosing the Full-

Notices or providing that the assurances contained therein are sent to employees by McDonald's. *See id.*

In short, the settlement agreements and Special Notice form say what is stated on their face. Throughout the objection and approval proceedings below the Charging Parties repeatedly challenged the adequacy of the Special Notice "remedy" for, *inter alia,* failing to provide the detailed "WE WILL NOT" specifications and assurances that are vital to a Board notice. Neither McDonald's nor the General Counsel made any attempt to refute that contention. At no point until now did the General Counsel assert that "McDonald's USA would, by issuing the Special Notice, distribute to employees the notice the franchisee had failed to post and thereby apprise employees of its contents." GC Brief at 11. After full briefing on this point, including all parties' opportunity to file opening and reply submissions, the ALJ issued an Order finding that the Special Notice was a deficient mechanism because it failed to provide employees a fully detailed notice concerning the alleged violations committed by the franchisees along with the "consonant reassurances" that employees should receive. Order at 31. The General Counsel may not now claim that McDonald's notice obligations mean something that they manifestly do not.

As the Republican-majority Board confirmed in *Local Union 290,* 348 NLRB 998, this unilateral, *post hoc* attempt by the General Counsel to revise or amplify the previously executed settlement documents submitted to the ALJ only reinforces the propriety of her Order denying approval. In *Local Union 290*, like the present case, there was ambiguity regarding default mechanisms, and the stipulated settlement did not include the General Counsel's proffered explanation.[6] As the Board emphasized in rejecting the settlement there, "while it may well be

[6] In particular, the written settlement in *Local Union 290* failed to include certain representations by the General Counsel about what would occur in the event of non-compliance. 348 NLRB at 998. Although the Regional Director's transmittal memorandum indicated that the

that the parties have agreed" to what the General Counsel described, "we would require these matters be spelled out, in writing, in the [settlement] stipulation itself." 348 NLRB at 998. Thus, the *Local Union 290* majority dismissed Member Liebman's call for an *Independent Stave* "reasonableness" review as inapplicable, absent a clear agreement to evaluate: "The problem in the instant case is *the threshold issue of ascertaining what the stipulation entails, and spelling that out in the stipulation itself.*" 348 NLRB at 998 (emphasis added).

The same threshold problem here likewise compels rejection of the proposed McDonald's settlements. The General Counsel cannot cure this deficiency by announcing, at this late juncture, his unwritten understanding that McDonald's will enclose the Full-Notice with the Special Notice when the settlement agreements do not say that.[7] Rather, the General Counsel's introduction of new uncertainty and confusion about a settlement component for the first time, at the appeal stage, only bolsters the ALJ's finding that there was no meeting of the minds. Board precedent forecloses approval where, as here, the General Counsel's understanding is inconsistent with the plain language of the settlement documents as well as the settling parties' prior representations on the record. *See Local Union 290*, 348 NLRB at 998; *Doubletree Guest Suites*, 347 NLRB at 784. The Board must deny the special appeal requests and sustain the ALJ's Order on this basis alone.

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parties agreed to have the Board seek enforcement if respondents failed to comply with the order, there was no language in the written settlement memorializing that understanding. *Id.* In addition, it was unclear what would occur if respondents denied an allegation of noncompliance and disagreed with the filing of a petition for enforcement. *Id.*

[7] It is immaterial whether the General Counsel has simply misquoted the Special Notice here, or is relying on some discussion with McDonald's that never made it into writing, or understands the settlement agreement and Special Notice to require something different from or beyond what McDonald's believes is required.

B. The ALJ Properly Concluded That There Was No Meeting of the Minds Regarding Default Language and the Settlement Fund

In addition to the new instance of obvious confusion between McDonald's and the General Counsel detailed in Section II-A above, which in itself warrants rejection of the settlement agreements, the ALJ's Order correctly documents the settling parties' equally significant failure to present a coherent, mutually agreed understanding of the operation of the general default language and the "Settlement Fund."

1. With regard to the general default language, the ALJ found that "based on the array of conflicting contentions advanced by General Counsel and McDonald's regarding McDonald's obligations in lieu of a finding of joint employer status, it appears that the parties' understanding of the Settlement Agreements' terms is incomplete or at odds." Order at 28. To illustrate her point, the ALJ cited conflicting statements from the General Counsel about McDonald's obligation(s) if a franchisee fails to cure an alleged breach of a settlement agreement. On March 19, 2018, the General Counsel represented that in the event of any such alleged, uncured breach "[i]t then turns to McDonald's USA to remedy or implement the remedy that the Franchisee failed to." *Id.* at 28 (quoting Tr. 21198-99). However, on April 5, 2018, even though the settlement agreement language remained the same, the General Counsel substantially altered this description of the default mechanism by stating that McDonald's was obligated only to mail the Special Notice. *Id.* (quoting Tr. 21246).

While acknowledging that the ALJ accurately quoted the General Counsel in his explanation of the default obligations, the General Counsel now attempts to explain away the plain contradiction in his statements by putting blame on the ALJ for *her* interpretation of his unmistakable contradiction. *See* GC Brief at 19 (stating that "[t]he judge accurately quoted counsel for the General Counsel at the March 19 hearing…[but] [s]he did not interpret that

statement reasonably."). Rather than admit to having offered conflicting interpretations of the settlement language concerning a fundamental question—what are McDonald's obligations if a franchisee defaults?—the General Counsel argues that on April 5 counsel for the General Counsel was trying to answer a more specific question than he was addressing on March 19. *Id.*[8]

Frankly, it is immaterial whether the March 19 explanation was intended to be more abstract in nature than the April 5 representation, because the original explanation was wrong and was plainly at odds with the written settlement agreements and subsequent positions taken by the General Counsel. The ALJ did not err in concluding that the General Counsel did not fully understand the settlement agreements submitted on March 19. The General Counsel's subsequent, evolving understanding of those settlement agreements illustrates the very reason the ALJ rejected them—there was no meeting of the minds when the settlement agreements were submitted. *See Local Union 290, supra,* 348 NLRB at 998-99.

2. Given the "contradictory representations" of the parties, the ALJ also correctly concluded that there was no meeting of the minds with respect to operation of the Settlement Fund. Order at 28. As with the default provisions, the General Counsel represented to the ALJ on March 19 that the settlement agreements required more of McDonald's than later proved to be the case. Specifically, on March 19 the General Counsel described the Settlement Fund as something "McDonald's USA's set up for helping cure monetary remedies that would be part of a breach." *Id.* (quoting Tr. 21200). Here, again, the General Counsel's initial representation was contradicted at the April 5 hearing, when McDonald's was questioned about that remedial

[8] McDonald's does no better in attempting to explain away the General Counsel's change in understanding between March 19 and April 5, by placing the blame on the ALJ, who McDonald's wrongly accuses of "[relying] on her own gloss" when finding that a plainly contradictory statement is in fact contradictory. McDonald's Brief at 27.

obligation. *Id.* (quoting McDonald's counsel on April 5 as saying with regard to the Settlement Fund: "We don't have anything to do with it." Tr. 21318).

The General Counsel then doubled-down on his misunderstanding of the Settlement Fund by representing, in his post-hearing brief to the ALJ, that McDonald's will not only collect and return any unused "contributions" to the Settlement Fund, but that McDonald's itself will determine when a disbursement is warranted. Order at 29 (quoting the GC's Post-Hearing Brief at 9, n. 23 as stating "The settlement agreements impose the responsibility for the fund on McDonald's….[and it] *has the responsibility for deciding whether and when to trigger any disbursements from the fund*").

Citing to *Doubletree Guest Suites*, 347 NLRB at 784, the ALJ properly found that "these conflicting accounts evince a substantial and troubling level of confusion among the parties regarding McDonald's role in the establishment and operations of the Settlement Fund." Order at 29. She further found that the General Counsel's description of McDonald's authority with respect to disbursements from the Settlement Fund contradicted earlier statements from the parties. *Id.* Specifically, she identified incongruity in the General Counsel's description of McDonald's authority with respect to disbursements from the Settlement Fund as "essentially discretionary," by contrast to the parties' earlier statements "construing disbursements as mandatory in the context of the default process." *Id.*

The General Counsel would now discount the settling parties' originally divergent understandings regarding the Settlement Fund by arguing (1) that collection of the money is immaterial to operation of the fund; and (2) that the money has already been delivered. In essence, the General Counsel takes the position that even though he may have misunderstood an allegedly key component of the "global" settlement he drafted and concluded in order to

discontinue the largest case in the Agency's history, that issue is now moot. He further argues that the ALJ "should have been aware…[that] McDonald's counsel inaccurately portrayed McDonald's role in establishing the Fund." GC Brief 21. These extraordinary after-the-fact rationalizations do nothing to disturb the ALJ's finding that there was no meeting of the minds.[9]

The General Counsel's remaining justifications are equally befuddling. He first conflates the discrepancies over establishment of the Fund, discussed above, with the contradictions regarding the Fund's operation under the proposed settlements. GC Brief at 22. On the latter point, McDonald's and the General Counsel now pretend that there was no inconsistency in portraying McDonald's authority with respect to Settlement Fund disbursements as both "essentially discretionary" and "mandatory" in the context of the default process. *See* GC Brief at 23; McDonald's Brief at 29. In their last-ditch attempt to explain away this clear contradiction the proponents have finally, albeit belatedly, converged on the same *post hoc* rationale: McDonald's "mandatory" performance becomes "discretionary" when McDonald's elects to default. *Id.*

Given the General Counsel's propensity for reinterpreting and revising the McDonald's settlement agreements after the fact, his latest attempts to dodge clear contradictions should carry no weight before the Board. The ALJ correctly determined that there was no meeting of the minds at the point when these agreements were presented as final, five months ago, and on that basis alone the Board must deny the requests for appeal and sustain the ALJ's decision. If the General Counsel and McDonald's now wish to revisit the disputed settlements and repair them

[9] The Board, we submit, must reject out of hand the General Counsel's contention that the ALJ's failure to discern when McDonald's counsel was being less than forthright, making "inaccurate" representations, or engaging in puffery, somehow invalidates her ruling.

by mutual clarification or revisions in writing, the ALJ's Order leaves them free to do so. But that undertaking is not the Board's prerogative on this special appeal request.

III. THE ALJ PROPERLY CONCLUDED THAT THE SETTLEMENTS FAILED THE "REASONABLENESS" TEST

As noted above, the Board in *UPMC* reaffirmed the *Independent Stave* criteria for evaluation of a proposed settlement, placing primary emphasis on the "reasonableness" factor. *See UPMC*, 365 NLRB No. 153, slip op. at 1, 8 (identifying "the 'reasonableness' factor," *i.e.*, "factor 2," as "the most important consideration"). *UPMC* has particular significance in the present case, the ALJ rightly recognized, because it illustrates what this Board considered adequate for approval of a mid-trial settlement to avoid an ALJ ruling on joint-and-several-liability—in particular, a formal and unqualified "guarantee" of all remedial obligations. *See* Order at 19, 22-23 and n.34. As the ALJ further concluded, and as explained below, such a remedial "guarantee" requires no admission of any joint-employer relationship and is fully compatible with McDonald's adamant disclaimer of joint-employer liability in this case. *Id.*

UPMC involved a bifurcated trial in a ULP case against a hospital and its parent corporation as an alleged "single employer" or "single integrated enterprise;" the ULP merits case was tried first, to be followed by trial on the single-employer issue. After closing the record in the first phase, and before proceeding with the General Counsel's affirmative case in the second phase, the ALJ accepted UPMC's consent settlement/dismissal motion providing that UPMC would "guarantee" performance of any and all remedies ordered against the hospital. *UPMC*, 365 NLRB No. 153, slip op. at 23 and n.4, 26. In approving that resolution over the General Counsel's and Charging Party's objections, the *UPMC* Board highlighted several key factors that made it "reasonable" and proper to accept the formal "consent settlement" guarantee in lieu of proceeding with an evidentiary trial and decision on UPMC's joint and several liability.

See Order at 20-23 and n.34.

The ALJ here undertook a careful reading of *UPMC* and properly evaluated its relevance to and implications for the present case. Even assuming that there was in fact a "meeting of the minds" on the terms of the proposed settlement (factor 1), that proposal failed the "most important" test under *UPMC* and *Independent Stave*, the "reasonableness" standard (factor 2). Any one of the following deficiencies justified the ALJ's denial of approval in this case. Collectively, they compel rejection of the 30 informal settlements as not "reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation." *UPMC*, 365 NLRB No. 153, slip op. at 8. *See* Order at 2, 40.

A. The ALJ Properly Found the Proposed Settlement Unreasonable Based on its Multiple Inadequacies in Form

1. A Formal Settlement Is Required In this Case.

Given the scope and context of this case, including the extent and seriousness of the ULP allegations, the ALJ properly determined that a formal settlement was warranted. *See* Order at 25-26. She relied on three factors in so deciding: (1) the Board's Rules and Regulations favor a formal settlement after the issuance of a complaint; (2) the enforcement mechanisms of the 30 informal settlements were unduly complicated here (*see infra* at 34-35); and (3) the similarity of multiple violations on which complaints issued at multiple McDonald's restaurants positions this case in the "repeat offender" context, which likewise favors a formal settlement. *See id.* at 25.

The informal settlements proposed here are plainly at odds with the Board's policy that "after issuance of a complaint, the Agency favors a formal settlement." NLRB Statements of Procedure § 101(b)(1). The General Counsel offers two half-hearted rejoinders to the plainly stated preference for a formal settlement—that Section 101.9(d)(1) of the Board's Rules and Regulations contemplates approval of settlements after a hearing begins, and that the Board has

approved non-Board and informal settlements in cases pending before an ALJ. *See* GC's Brief at 8. But the fact that a judge *could* approve an informal settlement in some other case does not compel the ALJ to find it reasonable here.

Convincing to this ALJ, who spent three years with this case and these parties, was the prospect of enforcing compliance and the more complicated default processes implicated in an informal settlement. Order at 25. Specifically, the ALJ found it appropriate in this case that there be a simple enforcement mechanism that would not entail further litigation. *Id.* She found it "beyond dispute" that some respondent franchisees treated as separate legal entities under the 30 informal settlements are, in fact, related entities "controlled by the same owner-operator organization" which are alleged to have committed multiple unfair labor practices. *Id.* Moreover, the ALJ found it "specious" that McDonald's, in an attempt to avoid a finding of "repeat offender status," insisted that it did not control its own "corporate" store. Order at 26.

Relying on the remedial compromise found reasonable in *UPMC*—which required a formal, fully enforceable Board order to address only a small number of ULP allegations, limited to just one workplace—the ALJ rationally concluded here that only through a formal settlement can the Agency ensure prompt, efficient and effective enforcement of the remedies agreed to by McDonald's and its 30 franchisee-respondents in a consolidated case of this size and scope, involving over 180 ULP allegations at 30 restaurants in six Regions. *See* Order at 25.

2. <u>It is Unreasonable to Allow for Premature Withdrawal of the Complaints and Not Require Remedial Performance by Officers, Agents, Successors and Assigns</u>.

The settlement agreements proffered by the General Counsel also failed to satisfy the "reasonableness" test because they require the premature withdrawal of all complaints and fail to ensure remedial performance by officers, agents, successors and assigns. Order at 26. The ALJ's decision thoroughly reviews these concerns and concisely explains her conclusion that such

resolutions are anomalous and clearly unreasonable: "given the unprecedented and enormous resources" expended in connection with a case entailing "155 days of trial over three years involving testimony of approximately 150 witnesses, incessant motion practice, subpoena enforcement litigation in five different venues throughout the country, and Special Master adjudication of hundreds of privilege claims," the proposed disposition of this proceeding by a set of "informal settlement[s] which provide[] for the anomalous withdrawal of the Consolidated Complaint in 10 days without full compliance is *manifestly unreasonable.*" Order at 27 (emphasis added).

The ALJ appropriately considered the NLRB Case Handling Manual, at Section 10154.4, which instructs that where the ALJ approves a mid-trial, pre-decision settlement agreement, counsel for the General Counsel should "move for an indefinite adjournment" and defer withdrawal of the complaint until "[a]fter compliance has been effected." Order at 26. Yet the settlements here call for summary withdrawal of all complaints within 10 days of the ALJ's approval of the agreements. *See* GC Ex. Settlement 1-30; McDonald's Ex. 20-49. The General Counsel has presented no justification for prematurely releasing all parties and terminating this proceeding. In contrast, the Board's decision in *UPMC* provides full justification and support for the ALJ's determination in this case: in *UPMC*, the Board made sure that the parent corporation remained a party to the case, despite dismissal of single-employer allegations, thus ensuring full remedial compliance. *UPMC*, 365 NLRB Slip. Op. at 11 (stating that "we shall retain UPMC as a party for the purpose of ensuring enforcement of UPMC's guarantee of the remedies, if any, ultimately ordered against Presbyterian Shadyside").

The significant loophole created by premature withdrawal of the complaints only exacerbates the problems and deficiencies resulting from the absence of a formal settlement and

enforceable order. *See* Order at 27 (stating that "omission of the typical language binding a respondent's 'officers, agents, successors, and assigns' with respect to the relief in question" is "problematic"). In *UPMC*, the Board expressly emphasized that the settling respondent's remedial guarantee was fully binding against the respondent's "officers, agents, successors and assigns" by virtue of the inherent reach of a standard Board Order. *UPMC*, 365 NLRB No. 153, slip op. at 8 n.14. In this case, by contrast, there have already been reported changes of ownership at several of the franchisee restaurants, as the ALJ noted. *See* Order at 27 ("New York Franchisees acknowledge that four of the ten Franchisee Respondents or Charge Party locations in New York City have changed ownership" and one "has ceased to operate entirely"). Yet the settlements proposed here include no formal orders and no other provisions legally binding any respondent's officers, agents, successors and assigns.

It was indisputably rational and proper for the ALJ to conclude that the typical Board language binding respondents' "officers, agents, successors and assigns" is warranted here because the Respondents in this case are not such assuredly "stable" entities as to make the usual remedial order language unnecessary. Order at 27. McDonald's only justification for excluding that language is that *Independent Stave* did not "require" it. McDonald's Brief at 42. For his part, the General Counsel merely argues that "[s]uccessor and assigns language is routinely absent from informal settlement agreements," highlighting another fatal problem with these settlements. GC Brief at 14.[10]

[10] Recognizing the fundamental deficiency entailed by not requiring any successor and assigns language in the "global" McDonald's settlements, the General Counsel tries but fails to mitigate this defect through empty assertions that other processes in the settlement agreements serve the same purpose. *See* GC Brief at 14 (arguing that in some instances where a Respondent Franchisee no longer operates the facility covered by a settlement agreement, the inadequate Notice will be mailed rather than posted, and that in other cases the Franchisee Respondent

In short, the ALJ had ample cause to reject the proposed settlements because, without justification, they prematurely withdraw the complaints and provide no formal order making remedial obligations binding on respondents' officers, agents, successors and assigns. That determination was well-founded, not arbitrary, and was not the result of an error of law; accordingly, it must be upheld.

3. A Reasonable Settlement Disposing of this Monumental Case Should Not Include Non-Admissions Language.

As noted by the ALJ, the Board has held that non-admissions clauses should not be included in a Board Notice to Employees "under any circumstances." Order at 31 (quoting *Manchester Plastics*, 320 NLRB 797, n. 1 (1996)). Moreover, the ULP Case Handling Manual, at Section 10130.8, provides that "[n]onadmission clauses should not be routinely incorporated in settlement agreements." Yet contrary to that policy, the General Counsel indefensibly agreed to include broad non-admissions language (covering both McDonald's and its franchisee) not only in the "Scope of Agreement" section of each of the 30 proposed settlements, but within the short-form "Special Notice to Employees" that McDonald's issues in the event of a franchisee default. *See* GC Ex. Settlement 1-30; McDonald's Ex. 20-49.

This unjustified concession by the General Counsel only exacerbates the use of an inherently weak and deficient *informal* settlement. As the D.C. Circuit has reminded the Board, such an arrangement is essentially toothless – it does not actually remedy any ULPs, and it cannot serve as an effective tool to prevent or deter subsequent unlawful conduct: "If, however, the [General Counsel] elects to approve a settlement in which the parties specifically agree that the charged party does not admit having violated the National Labor Relations Act, as here, then,

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remains theoretically responsible for posting the Notice even though it no longer operates that facility).

plainly, the employer has not agreed to remedy unfair labor practices. Rather, the employer has agreed *to take certain actions to secure a dismissal of the pending unfair labor practice charges – nothing more and nothing less*." *BPH & Co. v. NLRB*, 333 F.3d 213, 222 (D.C. Cir. 2003) (emphasis added).

In their collective 75 pages of briefing submitted in support of their respective special requests for permission to appeal, neither McDonald's or the General Counsel addresses the ALJ's finding that the settlement agreements should not have included non-admissions language. In rejecting these settlements, the ALJ correctly considered that the Special Notices—the only material performance required of McDonald's under the settlement agreements—impermissibly contains a non-admissions clause. Order at 31.[11] Such unjustified departure from controlling Board case law and standard Board settlement practice would qualify as unreasonable in any case; it is especially untenable in a case of this size and magnitude. Under *UPMC* and *Independent Stave*, the ALJ acted properly and well within her discretion in determining that the inclusion of non-admissions language here was unreasonable and justified rejection of the settlements.

B. The ALJ Properly Determined That the Settlements Are Not Reasonable Because They Fail to Provide an Effective Remedy

1. <u>The Settlements Are Not Reasonable Because Their Core Notice Posting Remedy Is Inadequate</u>.

As the Board and the courts have long recognized, notice is considered the most important remedy for affected employees. And in this case, it is the only remedy for most of the ULPs committed, and the only form of relief afforded to most of the employees whose rights

[11] Given the non-admissions clause in the Special Notice, the ALJ correctly rejected the General Counsel's argument that McDonald's Special Notice will ameliorate the effects of any additional violation breaching the Settlement Agreement which the Franchisee Respondent has failed to cure. *See* Order at 31.

were violated.[12] Thus, contrary to McDonald's insistence, the settlement agreements do not adequately vindicate workers Section 7 rights by providing make-whole relief because the notice is inadequate. *See* McDonald's Brief at 6, 14, 21.

Many, if not most, McDonald's franchisees operate multiple store locations.[13] Yet the proposed notice in each of the 30 settlements is unduly narrow in scope: each is to be posted at only a single store, and each is distributed only to employees working or previously employed at that one location. Indeed, these settlements unjustifiably limit the remedial notice footprint even where there are multiple ULPs committed within the same franchisee family, even where the ULPs grew out of franchisees in a geographic area following the same McDonald's coordinated response to the same concerted activity, and even where the ULPs involve "company-wide" (McDonald's and/or franchisee) unlawful policies in use at all franchisee-family locations. *See,*

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[12] Only some of the ULPs in the consolidated joint employer test case involved "discrimination," with only a handful of the affected workers being 8(a)(3) "discriminatees." Most of the violations involved threats, coercion and restraint, and those 8(a)(1) violations (which took place from top to bottom of the franchisor-franchisee network) had the most widespread and systematic impact on employees' concerted activity and their exercise of NLRA rights.

[13] For example, the ULP charges and proposed settlements in this consolidated proceeding alone involve multiple locations for the Paulino franchise operation in New York, Settlement Exs. 2 and 8; McDonald's Exs. 21 and 27 (1531 Fulton Street and 14 East 47th Street); the Colley operation in New York, Settlement Exs. 9-12; McDonald's Exs. 28-31 (2142 Third Avenue, 2049 Broadway, 4259 Broadway and 341 5th Avenue); the Karavites operation in Chicago, Settlement Exs. 13-16; McDonald's Exs. 32-35 (1004 W. Wilson, 600 N. Clark St., 10 East Chicago Ave., and 201 N. Clark St.); and the Lubeznik operation in Chicago, Settlement Exs. 18-19; McDonald's Exs. 37-38 (23 S. Clark Street and 4047 East 106th Street). On April 5, the General Counsel orally noted the recent resolution of certain other meritorious ULP cases involving Respondents here at other restaurants, including an additional location for Karavites, two other stores for Lofton, and one other Bailey store. *See* Tr. 21239-40. Charging Parties' records show at least three non-consolidated ULP cases involving two Bailey locations that Region 31 found meritorious and resolved separately, each with a narrow informal settlement: Case No. 31-CA-138311 (8(a)(1), unlawful interrogation, threats of hours reduction and loss of work, threatened imprisonment, impression of surveillance); Case No. 31-CA-144840 (8(a)(1), unlawful confidentiality policy); and Case No. 31-CA-189714 (8(a)(3), unlawful discharge/layoff of three employees).

e.g., Region 20 Complaint, GC Ex. 6(ee) at ¶ 7(g) (MaZT) (unlawful confidentiality policy "has been in effect at Respondent MaZT's Restaurant [8940 Pocket Road] *and an unknown number of other restaurants operated by Respondent MaZT*") (emphasis added); Settlement Exs. 13-16 (Karavites stores); McDonald's Exs. 32-35.

Here, again, each store location in this nationwide litigation is treated separately, in isolation, with the kind of concessionary informal settlement and limited remedial obligations one might expect for a case involving only a one-time, isolated ULP. That unfounded piecemeal approach governs every settlement, no matter how many ULP allegations are bundled into one case or agreement. Given the context and true nature of this case, a reasonable "global" settlement remedy should ensure not only that affected workers receive the notice electronically (*see infra* at 24-25), but that all franchise employees receive it. *See, e.g., Fresh & Easy Neighborhood Mkt. v. NLRB*, 468 Fed. App'x 1 (D.C. Cir. 2012) (sustaining company-wide remedies addressing company-wide policy, and area-wide notice posting correlating with union's area-wide campaign), *enforcing Fresh & Easy Neighborhood Mkt.*, 356 NLRB 546 (2011); *Albertson's, Inc.*, 351 NLRB 254, 384 (2007) (broad, corporate-wide remedial orders may be issued where ULPs have been committed at multiple, though not all, facilities) (collecting cases).

Moreover, when a franchisee fails to post the notice as required, the "McDonald's if necessary" component of the settlements as reflected in the Special Notice, *see infra* at 26-27, certainly does not inform employees of their rights in the manner and to the extent that is reasonable or should be required in a case such as this.

a. <u>Omitting Electronic Notice Posting is Unreasonable in a Case of this Size and Scope, Especially Given That Even Six Years Ago McDonald's Communicated Electronically with Franchise Employees.</u>

As the ALJ established, the Notice component of this settlement package does not reflect

NLRB best practice for electronic publication and dissemination under *J. Picini Flooring*, 356 NLRB 11 (2010), nor does it meet current remedial expectations for the scope and nature of these ULPs. *See* Order at 31-32 (the notices are "inadequate" because they do not require electronic posting "via email, intranet or internet"). In *J. Picini Flooring*, the Board held that "respondents in Board cases should be required to distribute remedial notices electronically when that is a customary means of communicating with employees or members." 356 NLRB at 11. Notably, the Board did not say that electronic notice is required only when it is *the* customary means of communicating with employees, but when it is "a customary means." *Id.*

Despite the scope and impact of the ULPs here (over 180 ULP allegations, affecting hundreds of employees in multiple cities), and despite many examples in the record of widespread electronic communications and web-based interaction across the McDonald's system, none of the proposed settlements provides for electronic notice. The ALJ found it significant that even during the 2012-2014 timeframe, McDonald's communicated with employees by email and through employees' regular use of the "McDonald's connection" system (a form of intranet) and the electronic dissemination of training and orientation materials at franchisee locations. *See* Order at 31.

The ALJ rightly faulted the General Counsel for dismissing the use of electronic notice without at least considering information as to McDonald's current practices regarding electronic communications with franchise employees.[14] *Id.* at 32. As she noted, *J. Picini Flooring*

[14] The General Counsel has presented no compelling justification for that omission. His defense for failing to explore the need for electronic notice in the lengthiest case Agency history is that he was not required to do it in a settlement because *J. Picini* suggested that it be done at the compliance stage of litigation. *See* GC Brief at 17. Indeed, he did not undertake any of the focused investigative inquiries and other "best practices" for ensuring appropriate electronic notice distribution and posting were used in formulating the settlements here. *See* Memorandum OM 12-57 (August 22, 2012) (outlining "best practices" for implementing *J. Picini Flooring*,

anticipates "the gathering of evidence regarding a respondent's customary means for communicating with employees at a time more proximate to the implementation of remedies." *Id.* (citing 356 NLRB at 13-14 and *Apex Linen Serv.*, 366 NLRB No. 12 at 2, 13 (Feb. 6, 2018)). Finally, the ALJ properly rejected the General Counsel's argument disputing whether electronic notice is "the best way to inform employees of the notice," because that is not what case law requires. Order at 32. As the Judge recognized, the Agency's current approach under *J. Picini Flooring* does not entail an either/or choice, *i.e.*, either electronic dissemination or physical posting and standard mailing. Rather, simply because one means of dissemination is viewed as "the most effective" or "more effective" than other feasible avenues does not mean that all of them should not take place concurrently. Here, again, the General Counsel's obvious deficiencies with regard to electronic notice have not been and cannot be explained away.

In his request for appeal, the General Counsel argues that the ALJ mischaracterized the evidence adduced at the hearing and misread *J. Picini Flooring*. *See* GC Brief at 15. However, the General Counsel's reading of *J. Pinci Flooring* is contrived at best. He nonsensically argues that *J. Picini Flooring*—which very clearly contemplated electronic notices *complementing* traditional notices—requires only paper notices here because his "rationale for using paper notices in this case respects the policy goals the Board advanced in *J. Picini*." GC Brief at 15-16. In fact, it is the General Counsel who misreads *J. Picini*, which clearly held that electronic notice is appropriate "when that is *a* customary means," not *the* customary means. 356 NLRB at 11 (emphasis added). Had the General Counsel displayed any "respect for the policy goals" set forth in in *J. Picini* he would have at least inquired as to McDonald's current practices for electronic

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including investigating the existence, scope and utilization of website, intranet and email systems, as well as the number and accessibility of traditional physical posting sites at the workplace); ULP Case Handling Manual, at Sections 10054.2(e) and 10132.4(b).

communications with franchise employees and/or prescribed electronic notice based on the practices he knew were in place six years ago. Given the ample evidence in the record concerning McDonald's electronic methods of communicating with franchise employees during 2012-2014, Board law and practice required electronic notice here, and the ALJ properly rejected settlement agreements omitting that remedial component.

b. <u>The Settlements Are Not Reasonable Because they Incentivize Nonperformance.</u>

As noted above, the proposed settlements here fail to ensure that the prescribed remedial notice is actually issued by the respondent franchisee or actually received by all the affected employees (past and current). In particular, if a franchisee fails to comply with its first-stage notice-posting and mailing obligations, McDonald's does not issue the same long-form, detailed "WE WILL NOT" notice that should have been published. Instead, it issues only the truncated "Special Notice" that fails to give employees the required remedial assurances (*e.g.*, that employees will not be discharged, disciplined or threatened because of their union activities, that the unlawful McDonald's schedule-confidentiality rule will not be applied and that the rule has been rescinded), while at the same time including legal disclaimers and improper nonadmissions language. *Supra* at 6, 20-21. *See* ULP Case Handling Manual, at Section 10130.8 ("It is Board policy that nonadmission clauses should not be included in notices.").

Moreover, even the inadequate short-form notice that McDonald's does issue in the event of a franchisee default will not be posted in the workplace, and it will not be distributed to all those who would have seen or received it absent the default. Instead, McDonald's distributes the Special Notice only by mail, and this paper form is sent only to current employees (not to those former employees who were employed at the time and affected by the violations). In short, the proposed settlement inexplicably fails to hold McDonald's even "secondarily" responsible, *i.e.*, it

does not require performance by McDonald's of the Franchisee's own remedial obligation in the event the franchisee fails to perform.[15]

Indeed, by contrast to *UPMC*, the structure and substance of the settlements here give the respondents an inherent incentive to non-perform at Stage 1 and go straight to Step 2. Doing so would allow the respondents to bury all the detailed ULP allegations at issue here and avoid what the Board colloquially refers to as the Notice's "guarantees," *i.e.*, explicit assurances to all affected employees that their employer will honor their rights, will cease the specific unlawful conduct identified, and will take the actions required in the long-form notice.

As the ALJ correctly pointed out, "if a Franchisee Respondent breaches a Settlement Agreement by failing to post the required Notice and fails to cure that breach, *no* Notice fully detailing the Franchisee Respondent's alleged violations, a consonant reassurances, will be provide to employees." Order at 31 (emphasis in original). McDonald's and the General Counsel offered no response to this issue in the proceedings before the ALJ, and the General Counsel's belated unilateral modification on appeal only underscores the fundamental deficiency of the proposed settlements, *see* Section II-A, *supra* at 6-10. The ALJ reasonably concluded that the settlement agreements do not serve to remedy the alleged violations because they incentivize nonperformance of the notice requirements, an essential element of relief.

2. <u>The Settlement Fund "Remedy" is Illusory.</u>

Some of the proposed settlement agreements include a provision entitled "Settlement Fund," which purports to be "for the benefit of any and all potential discriminatees who may be

[15] The trial record shows that McDonald's can and does require its franchisees to post and enforce prescribed policies and notices in the workplace, including its (unlawful) no-solicitation policy. *See* Order at 24 (citing to evidence in the record concerning McDonald's involvement in the posting of the "9-in-1" poster informing employees of their rights under federal and state law, and No Solicitation and No Loitering signs). Thus, McDonald's cannot plausibly pretend that it is unable to require the same with respect to these NLRB remedial Notices.

entitled to a monetary remedy as a result of an alleged breach of the settlement in this case or any of the other cases which were consolidated as of May 2015." *See* Settlement Exs. 1, 2, 3, 5, 15, 16, 20, 22, 28, 29; McDonald's Exs. 20, 21, 22, 24, 34, 35, 39, 41, 47, 48. But that broad language wholly misrepresents the scope and operation of the Settlement Fund. The ALJ found that the Settlement Fund does not appear to "constitute a significant deterrent to future conduct violating the Act or a meaningful remedial measure." Order at 30. Specifically, disbursements from the Settlement Fund only become available if the particular franchisee commits and fails to cure a violation of precisely the type alleged in the Consolidated Complaint. *See* Order at 30.[16]

The ALJ found it untenable that a Franchise Respondent alleged to have unlawfully reduced an employee's hours may "discharge[] that same (or another employee) for retaliatory reasons, [and] there is no recourse to the Settlement Fund to remedy the unlawful discharge." Order at 30. Using Respondent Jo-Dan's settlement as a hypothetical, counsel for the General Counsel expressly confirmed the ALJ's understanding that if "there was an allegation in the future that Jo-Dan, for example, suspended someone for a day in retaliation for their protected activities," that 8(a)(3) violation would not be a breach covered by the Settlement Fund since the operative language in paragraph (1) "is limited to a Jo-Dan employee's discharge." *See* Tr. 21249-50; Settlement Ex. 1, pp. 2-3; McDonald's Ex. 20 (Settlement Fund applies in the event of "a written notice from the Regional Director of a breach of this Settlement by virtue of a violation of Section 8(a)(3) of the Act arising from a Jo-Dan employee's discharge because of

[16] Counsel for the General Counsel acknowledged in response to the ALJ's questions at the April 5 hearing that this supposed "remedy" is tailored so narrowly that it comes into play only where (1) the specific settlement agreement signed by a given Respondent for a given store includes a Settlement Fund provision, and (2) that specific Respondent is found by the Regional Director to have breached that specific settlement agreement by committing precisely the same violation of 8(a)(3), as spelled out in the customized paragraph one of its individual Settlement Fund provision. *See* Tr. 21248-50.

his or her union membership or support during the nine month period following approval of the Agreement").

That this Settlement Fund is unavailable to remedy any future ULPs by most of the settling Respondents is bad enough. More damning still is the fact that even covered Respondents such as multiple-offender Sanders-Clark—whose individual settlement addresses 8(a)(3) allegations of unlawful "reduction in hours or suspension" for at least eight employees, *see* Settlement Ex. 28—can proceed to fire their employees outright for union support without triggering the Settlement Fund. As we have previously shown, the Settlement Fund admittedly entails nothing in the way of a remedy by McDonald's itself. *See supra* at 12-13. Given its negligible remedial significance with respect to the remaining 30 Respondents, the ALJ rightly considered the Settlement Fund a cosmetic feature, at best, that utterly fails to support the "reasonableness" of the settlements proposed here.

3. The Settlements Are Unreasonable Because They Release McDonald's Without Responsibility.

The ALJ found that the settlements proposed in this case would unreasonably release McDonald's without *any* responsibility, primary or secondary, for performance by the franchisees. *See* Order at 33-36. That finding was rational and proper, and neither of the settling parties has presented any plausible grounds for disturbing it.

In particular, McDonald's mistakenly argues that the ALJ committed reversible error in applying *UPMC* because she was impermissibly insisting on a "fully successful outcome" remedy, equating to joint-employer liability, when she considered the utility and significance of a McDonald's remedial "guarantee." *See* McDonald's Brief at 3-4, 32-33 (positing that "perhaps the [ALJ] preferred the inapposite full-remedy standard" which required the remedial effect to "approximate the remedial effect of a finding of joint employer status" (quoting the Order at

20)). The General Counsel, by contrast, argues that his proposed settlements actually do provide the near-equivalent of a fully successful litigation result, reasoning that true joint-and-several liability would be superfluous as a practical matter ("an empty gesture"). He also argues that the two specific undertakings by McDonald's here (*e.g.*, the "Special Notice" contingency, and the transmittal of franchisees' monetary contributions to the Settlement Fund) far exceed the open-ended, unqualified remedial "guarantee" that justified settlement approval in *UPMC*. *See* GC Brief at 10-13.

Here, again, these conflicting presentations confirm the fundamental discrepancy and lack of a meeting of the minds regarding what the proposed settlements actually require. And, leaving aside that obstacle, both arguments fail on their merits. Although Charging Parties disagreed with *UPMC*'s holding overruling *U.S. Postal Service*, 364 NLRB No. 116 (2016), all parties understand that *UPMC* is controlling here and that the proposed settlements need not impose "primary" (joint-and-several) liability on McDonald's to qualify as reasonable. Thus, the omission of joint-and-several liability is not a critical deficiency here. Rather, the settlement deal is unreasonable because it unjustifiably releases McDonald's from any responsibility for performance of meaningful remedies for the ULPs at issue here—it omits even the "secondary," contingent remedial responsibility provided by a formal "guarantee," the concession found reasonable in *UPMC.* As the ALJ correctly concluded, a guarantee requires no admission by McDonald's of joint-employer status, no organizational relationship, and no coercive control by the guarantor over the party whose performance is backed by the guarantee. Order at 23-24 (also noting evidence that McDonald's in fact requires specific performance by franchisees in various respects).

The ALJ also found that it was unreasonable to release McDonald's entirely—without even "secondary," contingent remedial liability—because in contrast to *UPMC*, where the settling respondent was a mere "bystander," McDonald's played a direct role in the circumstances underlying the ULP charges. *See* Order at 36. The ALJ specifically observed that "General Counsel has since the cases' inception contended that McDonald's coordinated and directed activities of its franchisees' response to the Fight for $15 campaign, which included violations of the Act alleged here." *See id*. at 33. She then devoted a portion of her Order to setting forth a detailed factual predicate, containing extensive citations to the record, in support of that finding. *Id*. at 33-36.

McDonald's and the General Counsel entirely miss the point of the ALJ's inclusion of record evidence concerning McDonald's coordination of the franchisees' response to the Fight for $15 campaign: it was not to illustrate McDonald's joint employer status, or to maintain that McDonald's directly committed ULPs. Rather, the ALJ considered that evidence in assessing the reasonableness of the settlements, given McDonald's proven role and involvement in coordinating the response to the Fight for $15 campaign, just as the Board in *UPMC* took into consideration the settling respondent's lack of involvement in the circumstances giving rise to the violations in that case. Order at 33. As the ALJ recognized, the Board's consideration of the respondent's "bystander" vs. "involved" roles in *UPMC* is indeed relevant and instructive: settling for a binding remedial "guarantee" in lieu of joint-and-several liability is a significant concession that was justified by the respondent's position as a wholly uninvolved bystander.

The ALJ did not even remotely suggest that McDonald's is directly responsible for the

commission of ULPs.[17] Yet, without attribution to the Order or transcript, the General Counsel summarily states that the ALJ "effectively concludes that McDonald's has primary liability for these ULPs." GC Brief at 27.[18] That unsubstantiated contention must not divert attention from the ALJ's well-supported conclusion that unlike UPMC, McDonald's was no mere "bystander" with respect to the ULPs alleged in this case, and McDonald's conduct is properly considered in evaluating the reasonableness of the proposed settlements.

C. The Risks of Litigation and Stage of the Case Support Rejection of the Settlements

The ALJ properly concluded that the risks inherent in litigation and the stage of the litigation favor rejection of the settlement agreements. *See* Order at 36-37. Her first finding in reaching that conclusion was that the limited time remaining to hear the complete evidence on the joint employer question distinguishes this case from *UPMC*, where settlement occurred before the parties even began presenting evidence on the single employer issue. *Id.* (noting that in the instant case "the parties' protracted presentations on the joint employer issue are nearly complete, with McDonald's having two additional witnesses to present on its direct case and the General Counsel intending to submit documentary evidence as rebuttal").[19] While explicitly recognizing that there will certainly be exceptions and appeals, the ALJ found that approval of

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[17] That is, of course, with the exception of ULPs involving the corporate store located at 2005 W. Chicago Avenue owned by McDonald's Restaurants of Illinois, Inc., a wholly-owned subsidiary of McDonald's. *See* Order at 26; Settlement Ex. 26; McDonald's Ex. 45.

[18] The General Counsel then inexplicably suggests that by merely citing to record evidence distinguishing this case from UPMC, the ALJ "treads on the Due Process Clause" because McDonald's was never on notice that it may be primarily liable for ULPs. GC Brief at 27.

[19] The ALJ suitably accounted for the 78 days of hearing the General Counsel utilized in presenting his case to establish McDonald's role as a joint employer and the 14 days McDonald's spent in response. *See* July 17 Order at 37. That presentation comprised the "bulk of the largest case ever adjudicated by this agency, and the longest hearing the agency has ever conducted." *Id.*

the settlement agreements at this stage does not save the Agency resources that could have been preserved had the case settled before addressing the joint employer question. *Id.*

The General Counsel and McDonald's respond by arguing that the ALJ did not give due consideration to the litigation that will follow absent settlement and the risk of loss. *See* GC Brief at 31, McDonald's Brief at 38.[20] The ALJ, however, did account for—and explicitly rejected as persuasive—the fact that further litigation is sure to follow if this matter is not settled. *See* Order at 37. She found, however, that on balance, the work ahead (whatever that might be) is "less onerous" and would "demand fewer resources than the lengthy, arduous trial presentation necessary to create the record thus far.[21] *Id.*

As for the intrinsic risks in continuing the litigation, the ALJ found that the uncertainty in future litigation is not a counterweight to acceptance of a settlement at this stage of litigation in such a monumental case. *See* Order at 39. She reached that conclusion after weighing the monetary relief offered to the 20 specific discriminatees involved in alleged violations of 8(a)(3) against the fact that the "overwhelming majority of the multitudes of unfair labor practices alleged involved either statements or policies and practices designed to inhibit the exercise of

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[20] McDonald's misreads the ALJ's finding. She did not suggest that the "matter is near completion." McDonald's Brief at 38. Rather, she found that with the joint employer presentation only a few days from completion, it did not make sense to settle and stop short at this time. *See* Order at 37.

[21] In addition, the proposed settlement package fails to achieve for the Agency a result commensurate with what went into successfully investigating and trying this joint employer case almost to conclusion, because it fails to address the General Counsel's stated goals in prosecuting this case: to hold McDonald's liable for remedying the alleged unfair labor practices in the original consolidated litigation, and "to clarify the relationship between franchisor and franchisee as it fits within the broader framework of what constitutes a Joint Employer under the National Labor Relations Act." *See* Tr. 21254. Although McDonald's and the General Counsel would dismiss this consideration out of hand as "irrelevant" and "usurp[ing] the General Counsel's prosecutorial duty," (McDonald's Brief at 36) the ALJ appropriately found that these facts weighed in favor of rejecting the settlement under a reasonableness test. *See* Order at 32.

Section 7 rights." *Id.* The ALJ aptly concluded that the relief offered for those violations was "paltry and ineffective given the scope of the allegations, the resources necessary in order to present the case, and the case's ultimate purpose." *Id.*

The Board certainly encourages reasonable settlement at any stage. But here, the ALJ who presided over the lengthiest case in Agency history found that settlement at this stage was not reasonable under *Independent Stave*. The Board should not disturb that finding.

D. The Settlements Fail the "Reasonableness" Test because They Create Additional, Unnecessary Inefficiencies that Waste Resources Already Expended

The General Counsel initially consolidated these ULP cases for efficiency, litigating the common issue of joint employment with a representative sampling of the many dozens of ULPs that had been found meritorious. Then, after nearly completing a lengthy trial on the question of joint employer status, he purported to seek a "global" settlement. But unlike *UPMC* (where both respondents remained full parties to one merits case), the General Counsel's resolution here immediately and formally terminates the centralized ULP cases, de-consolidating the proceedings into dozens of individual matters spread throughout various Regions. At the same time, the proposed settlement remedy builds in cumbersome, unnecessary steps and extra layers of complexity, to no real benefit. In effect, it requires the individual Regions to play "whack-a-mole" with 30 individual respondents to obtain full compliance.[22] As noted by the ALJ, "it does not appear that the proposed settlement will conclusively resolve these cases and preclude additional proceedings." Order at 27.

The ALJ was particularly troubled by the "Notification of Compliance" section of the settlement agreements, which provide that within 5 days of ALJ approval, each of the 30

[22] This is, of course, assuming the Respondents do not follow the logical short-cut incentive (*see supra* at 26-27) to use the "Special Notice" option to entirely bypass a full remedial notice.

separate Respondents is to notify one of six Regional Directors regarding the "steps" they have taken individually to comply with their specific agreement. Order at 27; GC Ex. Settlement 1-30; McDonald's Ex. 20-49. As the ALJ noted, it is not apparent whether and how the Regions are to act if timely response is not received.[23] *Id.*

The lack of clarity concerning the Notification of Compliance provision as written, coupled with the General Counsel's acknowledgement to the ALJ that a contested allegation that a settlement was breached could result in another hearing before an ALJ—with possible exceptions and appeals—fully justified her rejection of the settlement agreements. *See* Order at 27 (citing Tr. 21247). There is simply no sound rational for disaggregating the solid "global" case the General Counsel constructed concerning McDonald's coordinated, system-wide

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[23] Likewise, it is not clear whether the Regions are expected to do anything to verify timely reports saying that "steps" are in progress or completed (for example, by contacting the Charging Parties or Respondents themselves), or whether this is merely a *pro forma* notification.

Within 10 days of ALJ approval, the General Counsel must move to withdraw all allegations of all complaints (and all associated answers). Here, again, the agreements do not indicate whether this motion is made *pro forma*, without regard to whatever is or is not taking place on the ground with the Respondents, or whether the withdrawal motion must take account of compliance status for each of the 30 settlements. Likewise, it is not clear whether the settlement contemplates 30 separate motions to the ALJ, or one global motion covering all complaints; whether this withdrawal process involves a contested motion, with formal responses by Respondents and Charging Parties (whether separate responses to 30 motions, or a single response to one global motion); and whether the process entails individualized consideration of each withdrawal by the ALJ or is essentially a ministerial step to be routinely approved.

The next (and only mandatory) performance report to the Regions from each of the 30 separate Respondents is due at 60 days after ALJ approval of the settlements. Again, it is unclear what investigation or other administrative follow-up takes place to verify representations of full compliance made in timely reports, or in the event a Respondent fails to report, or if a closing 60-day report shows a compliance deficiency (*e.g.*, notice posting began several weeks late, or the Notice was posted but not mailed to all required recipients, or the Notice was taken down prematurely). Would McDonald's sole remedial obligation be triggered at that point, with the curative remedy consisting of the short-form, limited-distribution Special Notice? And does the Region proceed with re-issuing the first-step default complaint against the Franchisee Respondent in the meantime, or stay its hand pending this "Special Notice" mailing?

recidivist behavior in order to regress back to a pre-complaint posture yielding 30 informal, site-by-site settlements with complicated enforcement mechanisms.

IV. MCDONALD'S CLAIMS OF BIAS ARE COMPLETELY WITHOUT MERIT

McDonald's complains that the ALJ's conduct throughout this litigation "underscores the need for the Board to end it." McDonald's Brief at 43. In support of this unfounded grievance, McDonald's points to the ALJ's "perceptions regarding McDonald's USA's litigation of this matter," while acknowledging tongue-in-cheek that it "contested this matter zealously." *Id.*

This audacious attack on the character and motivations of a well-respected career ALJ illustrates why her Order appropriately included a detailed section describing the course of the litigation, which stands as a well-documented factual and procedural account. It is not "fake news" or personal "perceptions" when the ALJ reports that McDonald's conduct with respect to routine issues, such as subpoena compliance and claims of work product and attorney-client privilege, required federal court litigation in six different venues and substantial work by an appointed Special Master. *See* Order at 37.

McDonald's has demonstrated astonishing disregard for the ALJ's authority throughout the litigation. When McDonald's did not appeal a decision,[24] it refused to obey the Judge's

[24] Not counting the instant request, McDonald's has filed requests for permission to appeal orders of the ALJ on at least 12 prior occasions, at times seeking to appeal multiple issues in the same filing: (1) Feb. 10, 2015 request to appeal denial of its motion for a bill of particulars; (2) Feb. 10, 2015 request to appeal the ALJ's denial of McDonald's motion to transcribe the Feb. 11 teleconference; (3) Feb. 12, 2015 request to supplement its request to appeal regarding the bill of particulars; (4) Feb. 12, 2015 request to supplement its request to appeal the denial of transcription of the Feb. 11 teleconference; (5) Mar. 2, 2015 request for permission to appeal the ALJ's denial of its motion to sever; (6) Mar. 17, 2015 request to appeal the ALJ's case management order; (7) Apr. 24, 2015 request for permission to appeal the ALJ's order granting petitions to revoke subpoenas seeking patently irrelevant documents served by McDonald's on third parties; (8) Apr. 28, 2015 request to appeal the ALJ's denial of McDonald's motion to transcribe a teleconference regarding respondents' schedules for subpoena compliance; (9) July 2, 2015 request to supplement its Mar. 17 appeal of the case management order and to appeal a decision not yet rendered; (10) July 27, 2015 request to supplement its appeal of the case

orders.[25] There is no need to further catalogue McDonald's behavior because the ALJ anticipated the necessity for it in pages 2-14 of the Order. Even the current General Counsel (who manifests significant substantive agreement with McDonald's) acknowledges that throughout this litigation McDonald's has taken "many frivolous positions," by filing unnecessary motions and special appeals. *See* GC Brief at 28.

McDonald's complaint about the perceived injustices it suffered at the hands of the ALJ is so thin that it cannot identify more than a single instance, in over three years of litigation, where the Board sustained any of its twelve requests for intervention; and, notably, even that one exception was granted only in part. *See* McDonald's Brief at 44. Without apparent regard for its

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management order, to supplement its appeal of the denial of its motion to sever, and to appeal the ALJ's denial of its motion to amend the case management order/reconsider its motion to sever; (11) June 30, 2016 request for permission to appeal the ALJ's June 15, 2016 Order concerning McDonald's deficient response to the General Counsel's subpoenas; and (12) Oct. 9, 2017 request for permission to appeal the ALJ's Order granting petitions to revoke subpoenas issued to Charging Parties that were identical to subpoenas revoked two years prior and Order regarding production of an expert report.

[25] These include, *inter alia*, McDonald's refusals to (i) make timely production in response to the General Counsel's and Charging Parties' subpoenas *duces tecum*, *see*, *e.g.*, Order Adjourning Hearing from May 26, 2015 and Establishing Procedures for the Production of Information Pursuant to Subpoena (May 19, 2015) ("I am also hopeful that as of June 2, McDonald's will have been able to produce the ESI retrieved for the initial 28 custodians referred to in the parties' Motion papers") and Tr. 129:10–130:3 (stating that McDonald's had produced ESI from 10 of the 28 preliminary custodians the morning of June 2, 2015); (ii) properly produce documents without redaction, *see* Order Requiring McDonald's to Produce Unredacted Documents (June 15, 2015) and letter from W. Goldsmith to ALJ L. Esposito (June 22, 2015); (ii) provide an adequate, timely privilege log, *see* General Counsel's Motion for an Order Requiring Production of Certain Documents Withheld as Privileged by McDonald's USA, pp. 1-2 (Jan. 15, 2016); (iv) comply with the Nov. 30, 2015 deadline for completion of response to subpoena, *id.*; (v) produce the documents for which it had failed, after nearly a year and a half, to establish privilege, *see* Special Master Order Granting in Substantial Part General Counsel's Motion for Waiver of McDonald's USA's Privilege Claims (June 28, 2016) and letter from W. Goldsmith to J. Rucker, R. See, and M. Wissinger (Aug. 8, 2016); (vi) timely produce text messages, as instructed by both a district court and the Administrative Law Judge, *see McDonald's USA, LLC*, 364 NLRB No. 144, slip op. at 2 (Nov. 10, 2016); and (vii) appear on scheduled trial dates prepared to present evidence, *see* June 7, 2015 Scheduling Order and General Counsel's Motion to Preclude Alleged Expert Testimony and Admonish McDonald's, pp 3-5 (Jan. 2, 2018).

record of unsuccessful appeals, McDonald's pretends that the "'history of antagonism' in this matter has been the Administrative Law Judge's mishandling of it." McDonald's Brief at 44. In support of that impertinent statement McDonald's again cites the one instance where the Board reversed the ALJ—on the narrow issue of producing an expert report for its designated expert witness (a witness McDonald's refused to ever present at trial). *Id.* McDonald's can point to nothing else.

It speaks volumes about Respondents' conduct throughout the proceedings that, given all the significant issues allegedly at stake in this litigation, McDonald's continues to burden the record with repetitive, unfounded claims of bias and victimization. Despite that attempted distraction, the question before the Board concerns the ALJ's careful application of Board law to the proposed settlement agreements. As demonstrated here and in the ALJ's detailed, well-reasoned Order, there was no abuse of discretion: the ALJ acted properly and within the bounds of reasonableness in rejecting the proposed settlement agreements.

CONCLUSION

For all of the foregoing reasons, as well as for those argued before the ALJ, the Charging Parties urge the Board to deny McDonald's USA's and the General Counsel's requests for special permission to appeal the ALJ's Order.

August 20, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kathy L. Krieger, affirm under penalty of perjury that on August 20, 2018, I caused a true and correct copy of the foregoing Charging Parties' Opposition to Respondent McDonald's USA, LLC's and the General Counsel's Requests for Special Permission to Appeal the Administrative Law Judge's July 17 Order Denying Motions to Approve the Settlement Agreements to be filed electronically filed with the Executive Secretary of the National Labor Relations Board and served on the same date via electronic mail at the following addresses:

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